

37 Am. Jur. 2d Fraud and Deceit § 25

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Fraud and Deceit

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§ 25. Action for constructive fraud

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  6, 7, 26

Constructive fraud requires a fiduciary or confidential relationship, a breach of duty by the person in the confidential or fiduciary relationship, and that the person in breach accepted the fruits of the fraud¹ or induced justifiable reliance by the other to his or her detriment.² Constructive fraud does not require a showing of an intent to deceive³ or an intent to defraud.⁴ Constructive fraud does not require proof of fraudulent intent since the law indulges in an assumption of fraud for the protection of valuable social interests based upon an enforced concept of confidence both public and private.⁵ Also, the gist of a constructive fraud finding is to avoid the need to prove intent, that is, knowledge of falsity or intent to induce reliance since it is inferred directly from the relationship and the breach.⁶

To establish a claim for constructive fraud, the plaintiff must show: (1) the existence of a duty due to a relationship between the parties; (2) violation of the duty by making deceptive material representations of past or existing facts or remaining silent when a duty to speak exists; (3) reliance thereon by the complaining party; (4) injury to the complaining party proximately caused thereby; and (5) the gaining of an advantage by the party to be charged at the expense of the complaining party.⁷ A plaintiff can also establish constructive fraud by showing facts and circumstances creating a relation of trust and confidence, which surrounded the consummation of the transaction in which the defendant is alleged to have taken advantage of the relationship and that the defendant sought to benefit himself or herself in the transaction.⁸ To prevail on a constructive fraud claim, a plaintiff must show by clear and convincing evidence that the defendant negligently or innocently made a false representation of material fact and that the plaintiff suffered damage as a result of his or her reliance upon that misrepresentation.⁹ Other courts state that the elements of a constructive fraud claim are the same as those for actual fraud, except that if the defendant stood in a fiduciary or confidential relationship with the plaintiff, there is no requirement that the plaintiff establish the defendant's scienter, that is, his or her knowledge of the falsity of the representation.¹⁰

In some jurisdictions, constructive fraud will not lie where the parties are dealing at arm's length because there is no duty imposed on either party to protect or benefit the other.¹¹

No showing of undue influence is required to support a constructive fraud claim.¹²

CUMULATIVE SUPPLEMENT

Cases:

Under District of Columbia law, constructive fraud includes all the same elements as actual fraud, except the intent to deceive. [Himmelstein v. Comcast of the Dist., L.L.C.](#), 908 F. Supp. 2d 49 (D.D.C. 2012).

Under Tennessee law, a claim of constructive fraud requires similar detail as that of general fraud, except plaintiff need not identify an intent to deceive or dishonesty of purpose. [Fed.Rules Civ.Proc.Rules 8\(a\), 9\(b\)](#), 28 U.S.C.A. [Croteau v. National Better Living Ass'n, Inc.](#), 2013 WL 3030629 (D. Mont. 2013).

Local governments sufficiently alleged constructive fraud claim against companies that provided telephone service to consumers and were required to collect and remit to county and town charges to fund emergency call centers under South Carolina's 911 Act, by alleging that companies knew or should have known that their monthly remittance checks misstated the appropriate amount charged, collected, and remitted to local governments. [S.C. Code Ann. § 23-47-50\(A\)](#). [County of Dorchester, South Carolina v. AT & T Corp.](#), 407 F. Supp. 3d 561 (D.S.C. 2019).

In order to maintain claim for constructive fraud, plaintiffs must show that they and defendants were in a relation of trust and confidence that led up to and surrounded consummation of transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. [Brissett v. First Mount Vernon Indus. Loan Ass'n](#), 756 S.E.2d 798 (N.C. Ct. App. 2014).

Constructive fraud may be: 1) based on a negligent misrepresentation or an innocent misrepresentation where there is an underlying right to be correctly informed of the facts, 2) based on the silence by one who has a duty to speak, or 3) invoked to prevent harm or to extend protection to recognized public interests. [Croslin v. Enerlex, Inc.](#), 2013 OK 34, 308 P.3d 1041 (Okla. 2013).

[END OF SUPPLEMENT]

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Footnotes

¹ [Joyce v. Morgan Stanley & Co., Inc.](#), 538 F.3d 797 (7th Cir. 2008) (applying Illinois law).

² [Green v. Lisa Frank, Inc.](#), 221 Ariz. 138, 211 P.3d 16 (Ct. App. Div. 2 2009).

³ [Specialty Beverages, L.L.C. v. Pabst Brewing Co.](#), 537 F.3d 1165, 71 Fed. R. Serv. 3d 490, 66 U.C.C. Rep. Serv. 2d 643 (10th Cir. 2008) (applying Oklahoma law); [Green v. Lisa Frank, Inc.](#), 221 Ariz. 138, 211 P.3d 16 (Ct. App. Div. 2 2009); [Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp.](#), 285 Ga. App. 22, 645 S.E.2d 536 (2007); [Estate of Draper v. Bank of America, N.A.](#), 288 Kan. 510, 205 P.3d 698 (2009); [Town of Geraldine v. Montana Mun. Ins. Authority](#), 2008 MT 411, 347 Mont. 267, 198 P.3d 796 (2008); [Eggleston v. Kovacich](#), 274 Neb. 579, 742 N.W.2d 471 (2007); [Sears v. First Pioneer Farm Credit, ACA](#), 46 A.D.3d 1282, 850 N.Y.S.2d 219 (3d Dep't 2007); [Forbis v. Neal](#), 361 N.C. 519, 649 S.E.2d 382 (2007); [Armstrong v. Collins](#), 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005); [Kincaid v. SouthTrust Bank](#), 221 S.W.3d 32 (Tenn. Ct. App. 2006).

⁴ [Mindys Cosmetics, Inc. v. Dakar](#), 611 F.3d 590 (9th Cir. 2010) (applying California law); [Greco v. Greco](#), 2008 WL 4056328 (Tex. App. San Antonio 2008).

⁵ [Camp St. Mary's Assn. of W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes](#), 176 Ohio

App. 3d 54, 2008-Ohio-1490, 889 N.E.2d 1066 (3d Dist. Auglaize County 2008).

6 Gray v. Tri-Way Const. Services, Inc., 147 Idaho 378, 210 P.3d 63 (2009).

7 Barnett v. Elite Properties of America, Inc., 252 P.3d 14 (Colo. App. 2010), cert. denied, 2010 WL 4159679 (Colo. 2010); Fiederlein v. Boutselis, 952 N.E.2d 847 (Ind. Ct. App. 2011).

8 Shoaf v. Shoaf, 727 S.E.2d 301 (N.C. Ct. App. 2012).

9 Supervalu, Inc. v. Johnson, 276 Va. 356, 666 S.E.2d 335 (2008).

10 Schweizer v. Mulvehill, 93 F. Supp. 2d 376 (S.D. N.Y. 2000) (applying New York law); Klembczyk v. Di Nardo, 265 A.D.2d 934, 705 N.Y.S.2d 743 (4th Dep't 1999).

11 American Honda Motor Co., Inc. v. Motorcycle Information Network, Inc., 390 F. Supp. 2d 1170 (M.D. Fla. 2005) (applying Florida law).

12 Demming v. Underwood, 943 N.E.2d 878 (Ind. Ct. App. 2011), transfer denied, 962 N.E.2d 647 (Ind. 2011).

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